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# John T. Curnutte v. Utah Gas Service Co. et al : Brief of Respondents

Utah Supreme Court

Case No. 8971

# IN THE SUPREME COURT
# of the
# STATE OF UTAH

JOHN T. CURNUTTE,
*Plaintiff and Respondent*

— vs. —

UTAH GAS SERVICE COMPANY,
a corporation,
*Defendant,*

ERMA RANSDELL, doing business
as THE LARIAT CAFE,
*Defendant and Appellant.*

JUNE CURNUTTE,
*Plaintiff and Respondent,*

— vs. —

UTAH GAS SERVICE COMPANY,
a corporation,
*Defendant,*

ERMA RANSDELL, doing business
as THE LARIAT CAFE,
*Defendant and Appellant.*



## BRIEF OF RESPONDENTS

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## BRIEF OF RESPONDENTS

(Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

## STATEMENT OF CASE

We will answer the points in the Brief of Appellant in the order in which they are there set forth. Generally the facts recited in the brief are sufficient. We will

refer to any additional facts under the specific point where they may become material.

Our contention is that within Rule 56 (c) Utah Rules of Civil Procedure there was no genuine issue as to any material fact and therefore the trial court properly entered a summary judgment in favor of plaintiff on the issue of liability. See *Holbrook v. Webster's Inc.,* 7 Utah 2d 148, 320 P. 2d 661 (1958), *Abdulkadir v. Western Pacific R. R. Co.,* 7 Utah 2d 53, 318 P. 2d 339, *Holland v. Columbia Iron Mining Co.,* 4 Utah 2d 303, 293 P. 2d 700, *Matiwitch vs. Hercules Powder Co.,* 3 Utah 2d 283, 282 P. 2d 1044, *Ulibarri v. Christenson,* 2 Utah 2d 367, 275 P. 2d 170, *Morris v. Farnsworth Motel,* 123 Utah 289, 259 P. 2d 297, *Young v. Felornia,* 121 Utah 646, 244 P. 2d 862.

The defendant in her pleadings has admitted the Utah Gas Service Company was negligent in installing its gas pipes at the Lariat Cafe and in disconnecting the propane gas lines therefrom. It has admitted that this negligence was the proximate cause of the injuries received by plaintiff June Curnutte and of the death of Roberta Lynn Curnutte.

It appears from the record without dispute that defendant operated the Lariat Cafe and invited the public to come into her place of business. Also, it appears from her deposition that she employed the Utah Gas Service Company to install gas pipes in her cafe in order that she might use gas in conducting her business. The propane lines being in use, it was necessary, in performing this installation to disconnect them.

All the above facts are not in dispute. The question of whether or not this negligence of the gas company should be imputed to defendant is not a question of fact but one of law and under the authorities this negligence should be imputed to the defendant.

## STATEMENT OF POINTS

### POINT I

DEFENDANT ERMA RANSDELL IS RESPONSIBLE FOR THE NEGLIGENCE OF UTAH GAS SERVICE COMPANY IN THE INSTALLATION OF THE NATURAL GAS PIPES AND IN THE REMOVAL OF THE PROPANE GAS LINES.

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## ARGUMENT

### POINT I

DEFENDANT ERMA RANSDELL IS RESPONSIBLE FOR THE NEGLIGENCE OF UTAH GAS SERVICE COMPANY IN THE INSTALLATION OF THE NATURAL GAS PIPES AND IN THE REMOVAL OF THE PROPANE GAS LINES.

The best statement of the principles upon which plaintiffs rely for recovery is stated in *Prosser on Torts* (2d Ed.) 357 as follows:

"The employer of an independent contractor may be liable for any negligence of his own in connection with the work to be done. But the common law 'rule' has been that he is not liable vicariously for the torts of the contractor. To this rule certain 'exceptions' have been developed, which indicate a tendency to place the contractor upon the same footing as a servant. The more important exceptions are:

"a. Where the employer is under a duty to the plaintiff which the law considers that he is not free to delegate to the contractor.

"b. Where the work to be done is inherently dangerous to others, or will be dangerous unless particular precautions are taken.

"Even under these exceptions, it is commonly held that the employer will be liable only for risks inherent in the work itself, and not for 'collateral' negligence of the contractor."

The case at bar comes within both of these so-called "exceptions." Prosser further states on the same page:

"Against this argument (of no control — no vicarious liability), it has been contended that the enterprise is still the employer's, since he remains the person primarily to be benefited by it; that he selects the contractor, and is free to insist upon one who is financially responsible, and to demand indemnity from him, and that the insurance necessary to distribute the risk is properly a cost of his business. Upon this basis, the prediction has been made that ultimately the 'general rule' will be

> that the employer is liable for the negligence of an independent contractor, and that he will be excused only in a limited group of cases where he is not in a position to select a responsible contractor, or the risk of any harm to others from the enterprise is obviously slight. The English courts have taken steps in this direction, until the position of the ordinary independent contractor approaches that of a servant. The American courts, while they have not gone so far, have whittled away at the rule of non-liability with exceptions, to the point where it is not easy to say that any 'general rule' remains."

We will consider the admitted facts and the authorities under each one of these so called exceptions.

*Non-Delegable Duty*

Under the indisputed facts in this case, defendant had a non-delegable duty to her patrons to keep and maintain the premises of the Lariat Cafe in a reasonably safe condition. She could not delegate this duty to anyone. There can be no question that maintenance of the gas pipes and their proper installation would be a part of this non-delegable duty. The defendant was operating a public place and inviting members of the public to come in and eat at her cafe. She thereby assumed this obligation.

*Prosser on Torts* (2d Ed.) 359, states the rule as follows:

> "Again, it has been held in many instances that the employer's enterprise, and his relation to the plaintiff, is such as to impose upon him a duty

which cannot be delegated to the contractor. It has been mentioned earlier that there are numerous situations in which it may be negligence to rely upon another person, and the defendant is not relieved of the obligation of taking reasonable precautions himself. But the cases of 'non-delegable duty' go further, and hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. They are thus cases of vicarious liability. Such a duty may be imposed by statute, by contract, by franchise or charter, or by the common law. The catalogue is a long one: the duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, *to keep premises reasonably safe for business visitors,* to provide employees with a safe place to work, and many others. It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another. So far as they may be willing to broaden the category in the future, the law may approach an ultimate rule that any duty which can be found to rest upon the employer himself cannot be delegated to an independent contractor."

The rule is stated in *2 Harper & James, The Law of Torts,* § 26.11, page 1406, as follows:

"There are also situations wherein the law views a person's duty as so important and so peremptory that it will be treated as non-delegable. Defendants who are under such a duty '. . . cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be.' "

* * *

"Some common law duties are also non-delegable. Thus the landlord's duty of care to keep the common approaches in reasonable condition for several tenants, and the land occupier's duty of care to keep the premises reasonably safe for invitees or for adjacent owners or highway travelers, may not be avoided by the employment of independent contractors. In all these cases the employer is as liable for the conduct of the contractor as though it were his own."

The principle relied upon is also set forth in *2 Restatement of the Law of Torts,* § 425, as follows:

"One who employs an independent contractor to maintain in safe condition

(a) land which he holds open to the entry of the public as his place of business, or

(b) a chattel which he supplies for others to use for his business purposes or which he leases for immediate use,

is subject to the same liability for bodily harm caused by the contractor's negligent failure to maintain the land or chattel in reasonably safe condition, as though he had retained its maintenance in his own hands."

Two of the illustrative cases show that this section is particularly applicable to the case at bar:

> "1. A operates a department store. He employs the B Elevator Company to repair his elevators therein. Due to the negligence of the B Company, the elevator is dangerously defective. It falls and harms C who has come to buy and D who has come to the shop to look over the goods displayed. A is subject to liability to C and D.
>
> "2. A operates a hotel. He employs B as a plumber to install a shower bath. B negligently transposes the handles so that the hot water pipe is labeled cold. C, a guest, deceived by the label, turns on the hot water and is scalded. A is subject to liability to C."

*Section 422* also applies this same principle:

> "A possessor of land who entrusts the repair of a building or other structure thereon to an independent contractor is subject to the same liability to persons within or outside the land who are injured by the contractor's negligent failure to put or maintain the building or structure in reasonably safe condition as though he had retained the making of the repairs in his own hands."

It is stated in the comment at Page 1138 as follows:

> "* * * The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespec-

> tive of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay."

The following cases recognize and apply the principle here contended for by plaintiff. *Knell v. Morris,* 39 Cal. 2d 450, 247 P. 2d 352 (1952), *Brown v. George Pepperdine Foundation,* 23 Cal. 2d 256, 143 P. 2d 929 (1943), *Bazzoli v. Nance's Sanitarium,* 109 Cal. App. 2d. 232, 240 P. 2d 672 (1952) *Courtell v. McEachen,* (Cal. App.) 315 P. 2d 351 (1957), *Myers v. Little Church By The Side of the Road,* 37 Wash. 2d 397, 227 P. 2d 165, (1951), *Snyder v. Southern California Edison Co.,* 44 Cal. 2d 793, 285 P. 2d 912 (1955), *Grinnell v. Carbide & Carbon Chemicals Corp.,* 282 Mich. 509, 276 N.W. 535, *Bailey v. Zlotnick,* 149 F. 2d 505 (DC-1945), *Lilienthal v. Hastings Clothing Co.,* 131 Cap. App. 2d 343, 280 P. 2d 824 (1955); *Gill v. Krussner,* 11 N.J. Super. 10, 77 A. 2d 462 (1950).

We submit that all of the foregoing cases are authorities in favor of plaintiffs' position. We will review and quote from only a part of them.

In the Knell case, supra, a non-suit was reversed. Plaintiff owned a luggage store and the floor above was occupied by defendant MacMar, Inc. It had a water heater which began to leak. Defendant Morris, a plumber, was called to fix it. He used a radiator compound, left the heater going, and it leaked, causing plaster in plaintiff's place of business to fall. In reversing this dismissal the court stated:

"Inasmuch as the evidence is sufficient to support a finding that Morris was negligent, it was error to grant a nonsuit as to MacMar, Inc. The fact that Morris was acting in the capacity of an independent contractor does not necessarily absolve the corporation from liability. The general rule of nonliability of an employer for the acts of an independent contractor is subject to numerous exceptions. See Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P. 2d 929; McCordic v. Crawford, 23 Cal. 2d. 1, 142 P. 2d 7; Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 110 P. 2d 1044; Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720; Luce v. Holloway, 156 Cal. 162, 103 P. 886; Rest., Torts, §§ 410-429; Prosser on Torts, 1933, p. 645 et seq.; 23 A.L.R. 984. There is evidence in the present case which is sufficient to support finding in favor of plaintiffs under at least one of these exceptions, and it is unnecessary for us to consider whether MacMar may be liable under any other theory.

"It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition. See Rest., Torts, § 422. This principle was recently applied in Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P. 2d 929, to hold the owner of premises liable for the defective condition of an elevator."

In the Bazzoli case, supra, an action was brought t recover for personal injuries. Defendant employed plai tiff to put an additional layer on the floor in defendant' building. Defendant agreed to chip the first layer c cement so the second layer would stick and it employed

one Grimsley to do this. Plaintiff went upon the floor to pour the cement, his leg went through the floor and into a reservoir of scalding water underneath. Judgment for plaintiff was affirmed. Defendant argued that Grimsley was an independent contractor. Following the Brown case, supra, the court stated:

> "Even though we were able to agree with appellant's contention that Grimsley was an independent contractor, this would not relieve appellant from its obligation and duty toward an invitee as hereinbefore set forth."

In the Lilienthal case, supra, a clothing store owner and an independent contractor that waxed the store floor were sued for personal injuries received by plaintiff who fell on the floor. Judgment for defendants was reversed for errors in the instructions. The court stated:

> "The questioned instruction included the following advice: 'If a person does work for another, as an independent contractor, then under the law the person for whom the work was done is not responsible or liable for any act done by such independent contractor.'
>
> "In many cases that would be a correct statement, but not in this case. A store owner does not discharge his full duty toward business invitees by delegating care of the premises to an independent contractor. 'It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition.' Knell v. Morris, 39 Cal. 2d 450, 456, 247 P. 2d 352, 355. See also Brown v. George

Pepperdine Foundation, 23 Cal. 2d 256, 260, 143 P. 2d 929; McCordie v. Crawford, 23 Cal. 2d 1, 142 P. 2d 7; Restatement of the Law of Torts, § 422."

We submit that the negligence of the Utah Gas Service Company an independent contractor, is imputable to defendant Erma Ransdell on the grounds that her duty to her patrons and members of the public was nondelegable. It was the same as though defendant herself negligently installed and disconnected the gas pipes.

*Inherently Dangerous*

The installation and removal of gas lines is inherently dangerous to others and certainly would be dangerous unless particular precautions are taken to prevent leakage.

Both natural gas and propane gas have explosive propensities. If they are permitted to leak in buildings they accumulate and any spark or flame may touch off an explosion. Gas must be handled with care to prevent this from happening. Hence the work which defendant employed Utah Gas Service Company to do comes within this so called exception to the rule insulating an employer of an independent contractor from liability. The acts of the Gas Company in installing and removing the gas lines became the acts of defendant and since negligently performed, she is liable for the resulting damages. Prosser on Torts (2d Ed.) 360, 2 Harper and James, The Law of Torts § 26.11, page 1408.

The rule is stated in 27 Am. Jur. 515, Independent Contractors, section 38, as follows:

> "It is well settled that one who orders work to be executed, from which, in the natural course of things, injurious consequences must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see that necessary steps are taken to prevent the mischief, and such person cannot relieve himself of his responsibility by employing someone else, whether the contractor employed to do the work from which the danger arises or some third person, to do what is necessary to prevent the work from becoming wrongful. This rule is sufficiently comprehensive to embrace, not only work which, from its descriptions, is 'inherently' or 'intrinsically dangerous,' but also work which will, in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted."

The principle is thus propounded in *2 Restatement of Law of Torts,* § 427:

> "One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work."

This Court recognized the dangerous characteristics of gas in Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P. 2d 254, (1940) when it stated:

> "It is true that as a supplier of a dangerous substance a gas company is bound to high degree of care * * *."

The courts generally recognize the highly dangerous character of gas and its tendency to escape. See *Annotation 26 A.L.R. 2d 136* at 146. This same view is taken of butane gas. *Annotation 17 A.L.R. 2d* 880 at 881.

Applications of this exception or principle may be found in the following cases: *Burke v. Thomas* (Okl.), 313 P. 2d 1082 (1957); *Ulmen v. Schwieger,* 92 Mont. 331, 128 P. 2d 856 (1932); *Thompson-Cadillac Co. v. Matthews,* 173 Wash. 353, 23 P. 2d 399 (1933); *Pendergrass v. Lovelace,* 57 N.M. 661, 262 P. 2d 231 (1953); *Fegles Construction Co. v. McLaughlin Construction Co.,* 205 F. 2d 637 (9CCA-1953).

We submit that installation and removal of the gas pipes were such operations that from their very nature injurious consequences could be expected unless means were adopted to avoid those consequences. The installation and removal of pipe are fraught with potentialities of danger to any persons who might be in and about the cafe. Hence the negligence of the gas company is imputable to defendant under this principle.

## *BRIEF OF APPELLANT*

We will here undertake to answer the arguments made by defendant in her brief in the order in which they there appear.

*Non-Liability of Employer of Independent Contractor*

(Brief of Appellant, page 11)

Defendant asserts that an employer of an independent contractor is not liable for the negligence of the independent contractor, contending that our Supreme Court has recently so held in *Morley v. Rodman,* 7 Utah 2d 299, 323 P. 2d 717.

The issue presented in the case at bar was not before the court in the Morley case. No contention was made that the defendant owner of the automobile would be liable for the negligent acts of the driver even if he were an independent contractor. It was apperently conceded by the parties that if the driver were an independent contractor there would be no liability on the part of the owner.

The facts of the Morley case would not bring it within any of the exceptions mentioned in the Restatement, Prosser, or Harper and James heretofore cited.

Defendant also quotes from Prosser (2d Ed.) p. 143 § 32 under the subject Negligence-Standard of Conduct. The footnote, as might be expected, refers to the section where the subject Independent Contractors is discussed (Section 64, p. 357). These latter rules are the ones applicable and it clearly appears that the case at bar comes within the "exceptions" to the rule that an employer is insulated from liability for the negligent acts of an independent contractor. As stated by Prosser (2d

Ed.) 358 the "exceptions" recognized by the courts have reached a point where it is doubtful there is any so called "general rule" of non-liability.

*Duty of Owner or Occupier of Premises*

(Brief of Appellant, pages 11-16)

We do not quarrel with the rules announced by the authorities in this portion of the defendant's memorandum.

This is not a case of a plaintiff slipping on the floor of defendant's cafe and a reliance on negligence of the defendant herself (DeWeese v. J. C. Penny Co., 5 Utah 2d 116, 297 P. 2d 898; Lindsay v. Eccles Hotel Co., 3 Utah 2d 356, 284 P. 2d 477; Pennock v. Newhouse Realty Co., 97 Utah 408, 93 P. 2d 482).

This is a case of negligent installation of gas pipes and negligent removal of propane lines permitting gas to escape and causing an explosion. The defendant Erma Ransdell, through a company for whose acts she was responsible, negligently installed and removed gas pipes.

If an occupier of premises herself should undertake to install or remove gas pipes and did it negligently so that an explosion occurred causing injury to plaintiff the rules announced under this portion of defendant's brief would not insulate her against liability. It will not do to say in the case at bar defendant didn't do it personally because under the exceptions here applicable she is responsible for the acts of the installer and remover.

Leonard v. Enterprise Realty Company, 187 Ky. 578, 219 S.W. 1066, 10 A.L.R. 238 (1920), is not in point. The tenant moved out of the premises and either a person employed by him or someone unknown left the gas cock open causing gas to fill the apartment, which exploded when plaintiff lit a match on entering. The court specifically pointed out the gas cock was not left open by anyone who was under the control of or "connected" with the defendant landlord. That case is a far cry from a situation where a company is employed by the occupier of the premises to install and remove gas pipes and it does so negligently, particularly if the general public is invited to the premises involved.

Defendant again sets up a straw man and knocks it down when she emphasizes that the occupier of the premises is not an insurer of the safety of persons invited to enter. Plaintiffs do not contend for any such rule. The contention is a simple one which defendant does not, and cannot, meet. It is simply that defendant Erma Ransdell is responsible for the negligent acts of the gas company in installing and removing gas pipes from premises to which she invited the public and the installation and removal of which are dangerous unless special precautions are taken.

*Gleason Case*

(Brief of Appellant, pages 16-18)

Defendant cites and quotes from *Gleason v. Salt Lake City,* 94 Utah 1, 74 P. 2d 1225 (1937) and contends

that this case is authority against plaintiff. That case is not in point. The quotation on page 18 of Brief of Appellant discloses the vast distinction between that case and the case at bar. There can be no contention here that defendant could not anticipate that the gas company was going to install the pipes and remove the lines and that in so doing special precautions would have to be taken to avoid danger to persons coming into the cafe. Also in that case the condition was not one on the inside of defendant's place of business and where defendant invited members of the public to come. Also, there is a vast difference between handling a hose for water and pipes for a substance with the dangerous characteristics of gas.

The following quotation in that case from *Ohio Southern R. Co. v. Morey,* 47 Ohio St. 207, 24 N.E. 269, shows that this Court did not have in mind a case such as the one at bar:

> "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employes of an independent contractor, to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case, the person causing the work to be done will be liable, though the

negligence is that of an employe of an independent contractor."

The case at bar comes within the exception here referred to.

*Inherently Dangerous*

(Brief of Appellant, page 18-20)

Defendant takes the position that there was nothing dangerous about the installation of pipes because there was no gas in them and hence this case does not come within the exception contended for by plaintiff.

This overlooks the obvious. If no gas was to be put in the pipes, then of course the work would not be dangerous. But that is not the case here. Everyone knew and anticipated that gas would be put in the pipes. This latter fact is the one that made the work dangerous to others if proper precautions were not taken.

Paraphrasing the language of Prosser (page 357), this work would be dangerous to others unless particular precautions were taken against leakage because gas was going to be run through the pipes. If gas leaked there would be a likelihood of accumulation and explosion. If the propane lines were not properly removed there also was the likelihood of a dangerous accumulation of propane gas and an explosion.

We cannot just consider the mere physical work of installing and removing pipes. An inseparable part of this work was that it was performed so that gas could

be used in the cafe and of necessity run through these pipes.

*Restatement, Section 415*

(Brief of Appellant, pages 20-21)

Plaintiff does not contend that this principle of law applies here. Because it is inapplicable does not eliminate from this case the principles enunciated in sections 422, 425 and 427. For liability to be present under section 415 of course those elements set forth in the italicized portion of the quote on page 21 must be present but they need not be present for sections 422, 425 and 427 to apply.

We assert the negligent acts of the gas company are imputable to defendant, not that defendant was herself negligent. We do not have to prove her negligence if she is responsible for that of the gas company.

*Collateral Negligence*

(Brief of Appellant, pages 22-26)

The ultimate objective of the gas company and the defendant Erma Ransdell under their contract was to install the gas pipes and remove the propane lines safely with the exercise of reasonable care. Under the pleadings this was not done, but on the contrary the installation and removal was negligently performed. This was not so called "collateral" negligence. It was directly concerned with the job the gas company was hired to do.

The distinction between collateral negligence and negligence for which an employer of an independent contractor is responsible is well pointed out in *2 Restatement of the Law of Torts, Section* 426, p. 1147:

> "The negligence of a contractor in the course of performing work entrusted to him by his employer, which does not make the result fall short of that which it would be the employer's duty to attain, had he done the work himself, is collateral negligence."

In the case at bar the negligence in installing and removing gas pipes made the result fall short of that which the gas company contracted to do in its contract with the defendant Erma Ransdell. The gas company should have installed and removed with due care. The illustration given further points up this distinction (p. 1147):

> "A employs B, a competent contractor, to excavate a cellar on land immediately adjoining a public highway. The contract requires B to provide the fence necessary to prevent pedestrians from falling into the excavation. A is liable to C, a pedestrian, who falls into the excavation because the fence as erected by B is flimsy or because B has not erected the fence as his contract required. A is not liable to D, a pedestrian hurt by the carelessness of B's workmen in handling the timbers while they are erecting the fence or by the careless handling of tools while so doing."

*2 Harper & James, The Law of Torts,* page 1410, Section 26.11, further points up this distinction:

> "Even where the employer's duty is nondelegable, however, and from whatever source the nondelegable duty may be derived, the employer will not be liable for negligence of the independent contractor that is 'collateral' to the nondelegable duty. The owner of a building may be under a nondelegable duty to his invitees to use care to keep it reasonably safe and he will be liable for a defect negligently created or allowed to remain by a builder called in to make repairs. But he will not be liable to the invitee or the builder's negligence in dropping a tool on his head. Where the duty is nondelegable because of the inherently dangerous character of the work, conduct is 'collaterally negligent' when it does not involve the risks that made the work peculiarly dangerous. Painting a sign over the sidewalk and blasting are examples of inherently dangerous tasks (within this rule). Yet if the painter or blaster negligently ran over a pedestrian on the highway while bringing supplies to the job, his negligence would be collateral, and the employer would not be vicariously liable for it."

It is obvious that the case of Callahan v. Salt Lake City, 41 Utah 300, 125 P. 863, falls within the category of collateral negligence. There the street contractor in connection with its work of excavating the street, permitted dirt to fall into a gutter thus stopping the flow of water which flooded plaintiff's property. The situation is analogous to the builder's negligence in dropping a tool on the head of a passerby, which is mentioned in the foregoing quotation from Harper & James.

In the case at bar if the gas company employee had negligently hit someone with a tool or piece of pipe,

defendant could escape liability, but that result does not occur where the negligence is in the installation or removal itself.

In King v. Mason, (La.), 95 So. 2d 705, cited by defendant, the independent contractor was employed by the city to install a sewer. Incident to excavation work, a gas line was cut. This distinguishes that case from the one at bar. There was no occupant or possessor of premises who invited members of the general public into his place of business and the independent contractor had nothing to do with the installation or work on gas pipes. If a dangerous gas could come from the sewer pipe and it had been negligently installed so as to permit leakage the cases would be the same.

The case of Schermerhorn v. Metropolitan Gaslight Co., 5 Daly 144, has nothing whatsoever to do with the case at bar. The quotation from 18 Am. Jur., Electricity, Section 58, is merely a general statement of the rule relating to electricity which doesn't explode. Defendant emphasizes some parts of that quotation, but fails to emphasize the following:

> "There are, however, circumstances under which duties are imposed upon one which he cannot delegate to another."

The negligence here relied upon is the negligence in the installation and removal of the pipes which proximately caused an explosion and does not include a situation where the gas service company dropped a hammer on some one.

We submit that the trial court properly ruled that the negligence of the gas company was imputable to defendant.

## POINT II

## DEFENDANT ERMA RANSDELL HAS NOT BEEN DEPRIVED OF HER RIGHT TO A TRIAL BY JURY.

In *Abdulkadir v. Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P. 2d 339 (1957) plaintiff, against whom a summary judgment had been entered, contended he had been denied a trial by jury. This Court said:

> "We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. This, of course, does not go so far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure. The pertinent inquiry is whether under any view of the facts the plaintiff could recover. It is acknowledged that in the face of a motion for dismissal on summary judgment, the plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present, and every inference and intendment fairly arising therefrom in the light most favorable to him."

The purpose of a summary judgment is well stated in *Ulibarri v. Christenson*, 2 Utah 2d 367, 275 P. 2d 170 (1954):

> "The motion for summary judgment is for the purpose of expediting procedure and obviating trials where no genuine issue of fact exists."

In the case at bar whether or not the admitted negligence of the Gas Service Company was imputable to defendant is a matter of law as indicated under Point I hereof. There is no genuine issue as to any material fact for a jury to try.

## POINT III

### THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO AMEND HER ANSWER.

Whether or not defendant's motion to amend her answer should have been granted or denied rested within the discretion of the trial court. In its consideration of this point this Court is limited to a determination of whether or not the trial court abused its discretion in denying defendant's motion.

Defendant admitted that the Utah Gas Service Company negligently installed its gas pipes and negligently disconnected the propane gas lines at the Lariat Cafe; further admitted the explosion and that the negligence of the Gas Service Company proximately caused injuries to plaintiffs.

The defendant's motion was made after the argument for a summary judgment. Upon defendant making her motion, plaintiff filed a certified copy of defendant's complaint against the Utah Gas Service Company filed in the United States District Court for the District of

Utah (51-55). In the Federal Court action defendant here was plaintiff there and in her complaint alleged as follows:

> "3. That defendant, Utah Gas Service Company, is engaged in the business of distributing natural gas, particularly in the area in and around Monticello, San Juan County, Utah; that on and before August 12, 1956, the defendant company installed its gas lines in and to the Lariat Cafe at Monticello, Utah for the purpose of selling natural gas at said cafe.
>
> "4. That at all times herein alleged, the plaintiff was the owner of the premises and the building known as the Lariat Cafe and the fixtures and equipment used therein in the restaurant and cafe business; and that the plaintiff at all times alleged herein and up to and including August 13, 1956, was engaged in the restaurant and cafe business under the name of Lariat Cafe.
>
> "5. That the defendant, Utah Gas Service Company, negligently installed its gas lines and negligently disconnected the propane gas lines at the Lariat Cafe.
>
> "6. That after the said installation of the gas lines and the disconnection of the propane gas lines as aforesaid and on the 13th day of August, 1956, as a direct and proximate result of the aforesaid negligent acts of the defendant, an explosion occurred in the Lariat Cafe.
>
> "7. That at the time of the said explosion, plaintiff was working in the said Lariat Cafe in the conduct of her regular business; that as a direct and proximate result of the said negligent acts of the defendants, plaintiff suffered serious

> physical injuries, including injuries to and loss of the use of her right arm, permanent injury to her right eye and to her brain, permanent scars on her face, permanent injury to her left leg, extreme physical shock to entire nervous system, and that as a proximate result of said injuries and of the said negligence of the defendant, the plaintiff suffered and will continue to suffer physical and mental pain and suffering, all to her general damage in the amount of $100,000.00."

These are substantially the same allegations as contained in plaintiffs' complaint in the case at bar and which defendant admitted. The trial court was certainly justified in refusing to permit the defendant to play fast and loose with the courts. Her right to recover was based upon the negligence of the gas company and it was within the trial court's discretion to refuse to permit the defendant to back away from her solemn allegations and admissions concerning the negligence of the gas company.

In any event the defendant still alleges that the gas company was negligent in installing its pipes and as heretofore indicated under Point I, this negligence is imputable to defendant as a matter of law. The explosion, under the undisputed evidence, occurred inside the cafe and wherever the leak came from it of necessity entered the cafe. The negligent installation of a pipe which could create this result would come within the rule contended for by plaintiffs. Defendant's denial of the interpretation of negligence in the proposed amendment is merely a denial of a conclusion of law which must be resolved against defendant.

We submit the trial court properly denied defendant's motion to amend her answer, not only for the reason that it was not an abuse of discretion, but also for the reason that the amendment would have accomplished nothing.

## CONCLUSION

We submit that there was no genuine issue as to any material fact presented in this case once defendant admitted the negligence of the Gas Service Company and that this negligence proximately caused the injuries and death for which plaintiffs here seek to recover. The question of imputing this negligence to defendant is a matter of law and the trial court correctly entered a summary judgment in favor of plaintiff and against defendant on the question of liability.

We submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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